

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ST. PAUL MERCURY INS. CO. : CIVIL ACTION  
:   
v. :   
:   
PHILADELPHIA HOUSING AUTHORITY : NO. 02-3511

ORDER

**AND NOW**, this 20<sup>th</sup> day of August, 2003, upon consideration of Motion for Partial Summary Judgment by Philadelphia Housing Authority (paper #45), Opposition to Defendant's Motion for Partial Summary Judgment (papers ##48 and 53), Motion in Limine to Preclude the Testimony of Plaintiff's Expert Witnesses (paper #46), Opposition to PHA's Motion in Limine (#50), Motion Requesting Pretrial Ruling on Burden of Proof (papers ##48 and 49), Defendant's Response to Plaintiff's Motion Requesting Pretrial Ruling on Burden of Proof (paper #55), Motion to Preclude Testimony of Certain Witnesses Filed by St. Paul (paper #56), Response in Opposition (paper #60), Cross Motions to Compel Production of Electronic Mail Messages (papers ##57 and 59), PHA's Response to Motion to Compel and Attached Affidavit of Michael Tate (paper #58); and following a Daubert hearing regarding plaintiff's expert witnesses and oral argument on all pending motions, both conducted on August 19, 2003, it is hereby **ORDERED** that:

1. The Motion for Partial Summary Judgment by Philadelphia Housing Authority (paper #45) is **GRANTED IN PART** and **DENIED IN PART**:

a. The Motion is **DENIED** as to Counts I and IV because there exist genuine issues of material fact regarding contract terms; and

b. The Motion is **GRANTED** as to Count III because this action sounds in contract and plaintiff's negligence claim is barred by the gist of the action doctrine. See Blue Mountain Mushroom Co., Inc. v. Monterey Mushroom, Inc., 246 F. Supp. 2d 394, 402 (E.D. Pa. 2002) (applying Pennsylvania law to hold the doctrine precludes plaintiffs from re-casting breach of contract claims into tort claims);

2. To the extent Count II of the complaint has not been settled by the parties, it is **SEVERED** from the remaining counts and will be the subject of a trial commencing on **September 15, 2003**, at 10 a.m. in Courtroom

10-A.

3. Defendant's Motion in Limine to Preclude the Testimony of Plaintiff's Expert Witnesses (paper #46) is **GRANTED IN PART** and **DENIED IN PART**:

- a. The procurement of NDK Construction to finish the Project being irrelevant to matters before the court, no expert witness may testify to payments by St. Paul to NDK Construction;
- b. **Anthony Creamer's** testimony is limited as discussed on the record at the Daubert hearing held August 19, 2003; and,
- c. **William A. Manginelli** may provide an expert opinion based on his line item analysis method only;

4. The Motion Requesting Pretrial Ruling that Defendant Philadelphia Housing Authority ("PHA") Bears the Burden of Proof (papers #48 and 49) is **DENIED**. Plaintiff St. Paul bears the burden of proving it was prejudiced by the alleged overpayments. See Pennsylvania R. Company v. Fidelity & Deposit Co. of Maryland, 81 F.2d 526 (3d Cir. 1935) (citing to Pennsylvania case stating that "...there is no presumption that the surety company is harmed, the prejudice must be made to appear ...") (citation omitted); Fidelity & Deposit Co. v County of Lake, 2000 U.S. Dist. LEXIS 5497, \*15 (N.D. Ill. July 3, 2000);

5. The Motion to Preclude Testimony of Certain Witnesses Filed by St. Paul (paper #56) is **GRANTED IN PART, DENIED AS MOOT IN PART** and **DENIED IN PART**:

- a. **George Gomez**, being unavailable, may not testify on behalf of defendant;
- b. **Vince Mancini**, has been withdrawn by defendant; and,
- c. **James Conlin** may testify if made available by defendant for deposition by plaintiff within 14 days of the date of this order;

6. The court defers consideration of the Cross Motions to Compel Production of Electronic Mail Messages (papers #57 and 59) pending receipt of a joint report from plaintiff and defendant regarding efforts at resolution, to be submitted within 14 days of the date of this order.

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S.J.

